15-611

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1168.

GEORGE A. BOWMAN AND FRED. J. BOWMAN,
PLAINTIFFS IN ERROR,

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 21, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blogett, district judge of the United States for said northern district of Illinois, on Monday, the thirteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and tenth year.

WM. H. BRADLEY, *Clerk.*

Trespass on the Case.

GEORGE A. BOWMAN and FRED. W. BOWMAN
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

NORTHERN DISTRICT OF ILLINOIS, *ss*:

Be it remembered that on the eleventh day of February, 1885, came the plaintiffs, by their attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their *præcipe* for a writ of summons, and also, at the same time, filed their bond for costs in said entitled cause, which said *præcipe* and bond are respectively in the words and figures following, to wit:

2 *Precipe.*

STATE OF ILLINOIS, } *ss*:
County of Cook, }

Circuit Court of Cook County. March Term, A. D. 1885.

GEORGE A. BOWMAN and FRED. W. BOWMAN, Co-partners under the firm name and style of Bowman Bros., Plaintiffs,
v.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendants.
} Trespass $1,200.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass, to the damage of said plaintiff, in the sum of twelve hundred dollars, direct the same to the marshal of said district to execute, and make it returnable to the March term of said court, A. D. 1885.

BLUM & BLUM,
Plaintiffs' Attorneys.

To Henry Best, clerk.
Chicago, Feb'y 10, 1885.

(Endorsed:) Filed this 11th day of Feb'y, A. D. 1885. Wm. H. Bradley, clerk.

3 *Bond for Costs.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Circuit Court. March Term, A. D. 1885.

GEORGE A. BOWMAN *et al.*
v.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by them, I hereby agree and and stipulate that execution may issue against my property for any costs taxed against plaintiffs.

Dated this 10th day of February, A. D. 1885.

LOUIS T. BLUM.

Endorsed: Filed Feb'y 11, 1885. Wm. H. Bradley, clerk.

4 And afterwards, to wit, on the 26th day of February, A. D. 1885, said defendant, by B. C. Cook, its attorney, entered its appearance herein, which is in the following words, to wit:

5 *Appearance.*

Circuit Court of the United States, Northern Dist. of Illinois.

GEORGE A. BOWMAN *et al.*
v.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

I do hereby enter the appearance of the defendant in the above-entitled cause.

B. C. COOK,
Attorney for Defendant.

Endorsed: Filed Feb'y 26, 1885. Wm. H. Bradley, clerk.

6 And afterwards, to wit, on the 26th day of February, A. D. 1885, came the said defendant, by B. C. Cook, its attorney, and filed in the office of the clerk of said court its plea to said declaration, which said plea is in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Plea.

In the Circuit Court of the United States for the Northern District of Illinois. To the March Term, A. D. 1885.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY
ads.
GEORGE A. BOWMAN *et al.*

Now comes the said defendant, by B. C. Cook, its attorney, and

defends the wrong and injury when, &c., and says *actio non*, etc., because it says that the beer in said one thousand kegs in the
7 plaintiff's declaration and in each count thereof mentioned was at the several times in said declaration mentioned and still is intoxicating liquor within the meaning of the statute of Iowa hereinafter set forth; that the city of Marshalltown in said declaration mentioned is within the limits of the State of Iowa; that the said city of Chicago in the said declaration mentioned is in the State of Illinois; that the said beer in said declaration mentioned was offered to this defendant to be transported from the State of Illinois into the State of Iowa; that heretofore, to wit, on the 3d day of April, A. D. 1884, the General Assembly of the State of Iowa passed an act, entitled "An act to amend chapter 6, title XI, of the Code, relating to intoxicating liquors, and to provide additional penalties for violations of the provisions of said chapter and the amendments thereto," which act is chapter 143 of the laws of Iowa, passed at the twentieth General Assembly of said State, and which is printed and published in the laws of Iowa for the year 1884, page 146, to which act this defendant hereby refers and makes the same a part of this plea; that in
8 and by the fourteenth section of said act it was and is provided "that section 1553 of the Code be, and the same is hereby, repealed and the following enacted in lieu thereof: Section 1553. If any express company, railway company, or any agent or person in the employ of any express company or railroad company, or if any common carrier or any person in the employ of any common carrier, or if any other person shall knowingly bring within this State for any other person or persons or corporation, or shall transport between points within the State for any other person or persons or corporation any intoxicating liquors without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, certifying that such consignee or person for or to whom said liquor is to be transported is authorized to sell such intoxicating liquors in such county, such company, corporation, or persons so offending, and each of them,
9 and any agent of such corporation or company, shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars for each offense, and shall stand committed to the county jail until such fine and the costs of prosecution are paid, and one-half of the fine shall go to the informer and the other half shall go to the school fund of the county: And provided further, That the offense herein defined shall be held complete, and shall be held to have have been committed in any county of the State through or to which said intoxicating liquors are transported or in which the same are loaded for transportation: Provided further, That it shall be the duty of the several county auditors of this State to issue the certificate herein contemplated to any person having such permit, and the certificate so issued shall be truly dated where issued, and shall specify the date at which the authority or permit expires, as shown by the county records."

And the defendant avers that at the several times mentioned in

said declaration and each of them the aforesaid section
10 was the law of the State of Iowa, in full force and wholly unrepealed, and that the said plaintiffs did not at any time furnish this defendant with a certificate from and under the seal of the county auditor of the county of Marshall, the same being the county in which said city of Marshalltown is located, and the county to which said beer was offered to be transported, certifying that the person for or to whom the said beer was to be transported was authorized to sell intoxicating liquors in said county of Marshall, nor was this defendant furnished with any such certificate by any person whatsoever and the defendant avers that it could not receive said beer for transportation in the manner named and specified in the plaintiffs' declaration, without violating the law of the State of Iowa above specified, and without subjecting itself to the penalties provided in said act, and that this defendant assigned, at the time the said beer was offered to it for transportation as aforesaid,
11 as a reason why it could not receive the same, the aforesaid statute of Iowa, which prohibited this defendant from receiving said beer to be transported into the State of Iowa, or from transporting the said beer into the State of Iowa. And this the said defendant is ready to verify; wherefore it prays judgment, &c.

B. C. COOK,
Defendants' Attorney.

Endorsed: Filed Feb'y 26, 1885. Wm. H. Bradley, clerk.

And afterwards, to wit, on the eighth day of May, 1885, came the plaintiffs, by their attorneys, and filed in said clerk's office their amended declaration in said entitled cause, which said amended declaration is in the words and figures following, to wit:

12 Circuit Court of the United States, Northern District of Illinois. To the March Term, 1885, thereof.

GEORGE A. BOWMAN and FRED. W. BOWMAN, Copartners under the firm name and style of Bowman Bros.,

vs.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

George A. Bowman, who is a citizen of the State of Nebraska, and Fred W. Bowman, who is a citizen of the State of Iowa, plaintiffs in this suit, by Blum & Blum, their attorneys, complain of the Chicago & Northwestern Railway Company, who is a citizen of the State of Illinois, defendant in this suit, of the plea of trespass on the case:

For that whereas the defendant, on February 9th, 1885, and for a long time previous thereto and thereafter, was possessed of and using and operating a certain railroad, and was a common carrier of goods and chattels thereof for hire, to wit, from the city of Chicago, in the State of Illinois, to the city of Council Bluffs, in the State of Iowa.

That said defendant is a corporation existing by virtue of and under the laws of the State of Illinois, and that it was the duty of said defendant to carry all freight from and to all stations upon its line of railway that might be intrusted to it.

13 That upon February 9th, 1885, the plaintiffs offered to said defendant for shipment over its said line of railway, and directed to themselves at Marshalltown, Iowa, at which place said Fred. W. Bowman resides and at which place said partnership business is conducted, one thousand kegs of beer, to be shipped from said city of Chicago to the city of Marshalltown, in the State of Iowa, which is a station lying and being on said defendant's line of railway between said cities of Chicago and Council Bluffs, which said offer defendant refused, and defendant declined to receive said said one thousand kegs, or any part thereof, for shipment as aforesaid, to the damage of the plaintiffs of $1,200, and, therefore, they bring their suit, etc.

And for that the plaintiffs, who are neither of them hotel keepers, a keeper of a saloon, eating-house, grocery-keeper, or confectioner, on the 7th day of July, 1884, and upon several occasions thereafter, presented to the board of supervisors a certificate, signed by a majority of the legal electors of Marshalltown, Iowa, which stated that said Fred. W. Bowman is a citizen of said Marshall county, Iowa, and that both of said plaintiffs possess a good moral character, and that they (said electors) believe said plaintiffs and each of them to be a proper person to buy and sell intoxicating liquors for the purposes named in section 1526 of the Iowa Code; that at said time and upon several occasions thereafter *that* they and each of them filed a bond, which was approved by the auditor of the county where said application was made, in the sum of $3,000, with two or more
14 sureties, as is provided by section 1528 of the Code of Iowa; that thereupon said board of supervisors of said Marshall county refused to grant permission to either of said plaintiffs or to them jointly.

And for that whereas the defendant on February 9th, 1885, and for a long time previous thereto and thereafter, was possessed of and using and operating a certain railroad, and was a common carrier of goods and chattels thereon for hire, to wit, from the city of Chicago, in the State of Illinois, to the city of Council Bluffs, in the State of Iowa.

That said defendant is a corporation existing by virtue of and under the laws of the State of Illinois; that it was the duty of the said defendant to carry all freight from and to all stations upon its line of railway that might be intrusted to it. That on February 9th, 1885, one Louis J. Blum, who was the duly authorized agent of the plaintiffs for that purpose, offered for shipment to Mr. Wicker, the traffic manager of the said defendant railway company, who was at said time in its employ and authorized to act for said company in the premises, one thousand kegs of beer directed to said plaintiff at the city of Marshalltown, Marshall county, in the State of Iowa, which said thousand kegs of beer said Blum requested said Wicker to ship over said road, with which said request said Wicker, as the traffic manager of said company, refused to comply, and declined to ship said beer or any part thereof as aforesaid, the said Wicker then and there stating in writing that the said defendant company declined to receive said goods for shipment and would continue

to decline to receive said goods or any goods of like character for shipment into the State of Iowa, to the damage of the plaintiffs of $1,200, and therefore they bring their suit, etc.

BLUM & BLUM,
Attorneys for Plainiiffs.

Endorsed: Filed May 8th, 1885. William H. Bradley, clerk.

On the same day, to wit, on the 8th day of May, A. D. 1885, come said plaintiffs, by their attorneys, and filed their demurrer to said plea in words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States in and for the Northern District of Illinois.

GEORGE A. BOWMAN *et al. v.* THE C. & N. W. R. R. Co.

And the plaintiffs, by Blum & Blum, their attorneys, as to the plea of the defendant by it above pleaded, say that the same and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law to bar them, the plaintiffs, from having their aforesaid action, and they are not bound by law to answer the same, and this they are ready to verify. Where-
fore for want of a sufficient plea in this behalf the plaintiffs pray judgment, and their damages, etc., to be adjudged to them, etc.

And the plaintiffs, by Blum and Blum, their attorneys, as to the plea of the defendant by it above pleaded, say that the same, and the matters therein contained in manner and form as the same are above pleaded, are not sufficient in law to bar them, the plaintiffs, from having their aforesaid action, because they say that section 1553 of the Iowa Code, as amended, is unconstitutional and void, and that they are not bound by law to answer said plea, and this they are ready to verify; wherefore, for want of a sufficient plea in this behalf, the plaintiffs pray judgment, and their damages, etc., to be adjudged to them, etc.

BLUM & BLUM,
Attorneys for Plaintiffs.

Endorsed: Filed May 8, 1885. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 11th day of May, in the adjourned May term of said court, A. D. 1885, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

Trespass.

GEORGE A. BOWMAN *et al.*
v.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

On motion of the plaintiffs, by their attorneys, leave is given them to amend their declaration herein by increasing the *ad* [*quod*] *damnum* to ten thousand dollars. And now comes also the defendant, by its attorney, and now comes on to be heard the demurrer of the plaintiffs to the plea herein, and after hearing the arguments of counsel the court overruled said demurrer.

Afterwards, to wit, on the 23d day of June, 1885, there was
19 filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA, *Northern District of Illinois:*

In the Circuit Court of the United States, Northern District of Illinois.

GEORGE A. BOWMAN *et al.*
v.
THE CHICAGO AND NORTHWESTERN RAILROAD COMPANY.

It is hereby stipulated and agreed by and between the respective parties hereto that in making up a record of this cause to be transmitted to the Supreme Court of the United States the clerk of this court shall only transmit or copy into the record the amended declaration showing the *ad* [*quod*] *damnum* to be $10,000, and the plans of the defendant to said delaration, together with the demurrer thereto, and the ruling of the court thereon.

BLUM & BLUM,
Attorneys for Plaintiffs.
B. C. COOK,
Attorney for Defendant.

(Endorsed:) Filed June 23, 1885. W. H. Bradley, clerk.

20 And afterwards, to wit, on the 13th day of July, in the July term of said court, 1885, in the record of the proceedings in said entitled cause appears the following entry, to wit:

Trespass on the Case.

GEORGE A. BOWMAN and FRED. W. BOWMAN
v.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Now, on this day, come the said plaintiffs, by their attorney, and elect to stand by their demurrer to the pleas of the defendant, which demurrer was heard and overruled on the eleventh day of May last

by the court, whereupon it is considered and ordered by the court that judgment be, and the same is hereby, entered in favor of the defendant and against said plaintiffs upon said demurrer, and that this cause be dismissed at the cost of plaintiffs, and that execution issue therefor.

21 NORTHERN DISTRICT OF ILLINOIS, *ss*:

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of the proceedings made under the stipulation filed June 23rd, 1885, in said court in the cause wherein George A. Bowman and Fred W. Bowman are the plaintiffs and the Chicago and Northwestern Railway Company is the defendant, as the same appear from the records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this twelfth day of October, 1885.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk*.

22 UNITED STATES OF AMERICA, } *ss*:
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between George A. Bowman and Fred W. Bowman, plaintiffs, and the Chicago and Northwestern Railroad Company, defendant, in an action of trespass on the case, a manifest error hath happened to the great damage of the said George A. Bowman and Fred W. Bowman, plaintiffs, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1885, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of July, in the year of our

Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the 110th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY,
Clerk of the U. S. Circuit Court, Nor. Dist. of Ills.

23 [Endorsed:] Supreme Court of the United States. George A. Bowman & Fred W. Bowman, plaintiffs in error, *vs.* Chicago and Northwestern Railroad Company, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

24 UNITED STATES OF AMERICA } *ss:*
Northern District of Illinois, }

To The Chicago and Northwestern Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 18—, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein George A. Bowman and Fred W. Bowman are plaintiffs in error, and The Chicago & Northwestern Railway Company is defendant in error, to show cause, if any there be, why the judgment mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, dist. judge nor. dist., acting as cir. judge, this ninth day of October, in the year of our Lord one thousand eight hundred and eighty-five.

H. W. BLODGETT, *Judge.*

25 I hereby accept service of the within citation and hereby enter my appearance as attorney for the said The Chicago & Northwestern Railway Co., in the Supreme Court of the United States, in said cause.

Dated Chicago, October 15th, 1885.

B. C. COOK,
Att'y for C. & N. W. R'y Co.

[Endorsed:] Supreme Court of the United States. Geo. A. Bowman & Fred. W. Bowman *vs.* The Chicago & Northwestern Railway Co. Citation. To October term A. D. 1885.

26 In the Supreme Court of the United States. October Term, 1885.

BOWMAN *et al. vs.* CHICAGO & N. W. R. W. Co.

Now come the plaintiffs in error by Louis J. Blum, their attorney, and represent to the court that there is manifest error appearing on the face of the record, in this:

1. The circuit court erred in the law.
2. The circuit court erred in the facts.

3. The circuit court erred in overruling the plaintiffs demurrer to the defendant's plea.

4. The circuit court erred in rendering judgment in favor of the defendant.

5. The circuit court [erred] in not rendering judgment for the plaintiffs.

Wherefore the plaintiffs in error pray a reversal of said judgment.

LOUIS J. BLUM,
Attorney for Plaintiffs in Error.

Endorsed on cover: N. Illinois C. C. U. S. No. 1168. George A. Bowman and Fred. J. Bowman, plaintiffs in error, *vs.* The Chicago and Northwestern Railway Company. Filed October 21, 1885.

116-611

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1885.

GEORGE A. BOWMAN and
FRED. W. BOWMAN,
Plaintiffs in Error.

vs.

THE CHICAGO & NORTHWESTERN
RAILWAY COMPANY.
Defendant in Error.

Writ of error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF PLAINTIFFS IN ERROR.

BLUM ~~& BLUM~~,
Attorneys for Plaintiffs in Error.

S. I. BRADBURY & SONS, Legal Printers, 78-82 Fifth Ave., Chicago.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

GEORGE A. BOWMAN and
FRED W. BOWMAN,
Plaintiffs in Error.

vs.

THE CHICAGO & NORTHWESTERN
RAILWAY COMPANY,
Defendant in Error.

Writ of error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

The record in this cause discloses that plaintiffs in error are brewers and vendors of beer at Marshalltown, Iowa; and, in the course of that business, through their agent at Chicago, Illinois, offered to the defendant in error, for shipment to themselves at Marshalltown, one thousand kegs of beer, which defendant declined to transport; that defendant is a corporation, operating under charters from the States of Illinois and Iowa, its line of railway extending from Chicago to Marshalltown; that plaintiffs applied to the proper authorities

for the permit referred to in Section 1553 hereafter quoted, to sell beer for mechanical, medicinal, culinary and sacramental purposes, and were refused such permit; that, by reason of the refusal of defendant to ship said beer, plaintiffs sustained damage to the amount of ten thousand dollars. These facts are admitted by the pleadings.

To justify this dereliction of duty as a common carrier, defendant in error pleads the passage by the General Assembly of Iowa of the Act following:

"Sec. 1553. If any express company, railway company, or any agent, or person in the employ of any express company or railroad company, or if any common carrier or any person in the employ of any common carrier, or if any other person shall knowingly bring within this State for any other person or persons, or corporation, or shall transport between points within the State for any other person or persons, or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, certifying that such consignee or person, for or to whom said liquor is to be transported, is authorized to sell such intoxicating liquors in such county, such company, corporation, or persons so offending, and each of them, and any agent of such corporation or company so offending shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars for each offense, and shall stand committed to the county jail until such fine and the costs of prosecution are paid, and one half of the fine shall go to the informer and the other half shall go to the school fund of the county; and provided

further, that the offense herein defined shall be held complete, and shall be held to have been committed in any county of the State through or to which said intoxicating liquors are transported, or in which the same are loaded for transportation; provided further, that it shall be the duty of the several county auditors of this State to issue the certificate herein contemplated, to any person having such permit, and the certificate so issued shall be truly dated where issued, and shall specify the date at which the authority or permit expires, as shown by the county records." (See Chap. 143, Acts of the 20th General Assembly, contained in laws of Iowa for 1884, p. 150.)

Defendant in error further alleges the failure of plaintiffs to exhibit the permit in compliance with the section quoted.

To this plea, plaintiff in error demurred on the ground that said Section 1553 (above quoted) is unconstitutional and void. This demurrer was overruled by the Circuit Court, and, plaintiff electing to abide by his demurrer, said court rendered judgment in favor of the defendant, to reverse which judgment, a writ of error was sued out of this court.

ASSIGNMENT OF ERRORS.

The Circuit Court erred in overruling plaintiffs' demurrer to said plea, and in rendering judgment in favor of defendant, for the reasons following:

Section 1553, quoted, is unconstitutional and void, being in conflict with Section 8, Article 1, Constitution of the United States, which is as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," in that,

1. The power conferred by said clause is a power exclusive in Congress.

2. Section 1553 contravenes the will of Congress.

3. In enacting said section, the Legislature of Iowa exceeded its authority.

4. While a State, under its police power, may deny entrance to a nuisance *per se*, this power does not extend to property in its ordinary state.

5. The liquor in question in this case was never, nor is it now, a nuisance under the laws of Iowa, and, therefore, any law affecting its transportation among the States is a regulation of commerce among the States.

6. The intent of the Legislature, in enacting said law, is, like the effect of the law, to regulate commerce among the States.

7. The police power of the States can be exerted upon property only in an existing exigency; Section 1553 is not so exercised, but attempts to create a new and an extraordinary power which is entirely unnecessary and superfluous.

ARGUMENT.

I.

The power conferred by said clause is a power exclusive in Congress.

This court has had frequent occasion to interpret this section of the Constitution, and we find established by the authorities the doctrine that the power conferred by it is the exclusive power in Congress to regulate commerce among the States, and that the States are precluded from the regulation of commerce of a national or an inter-state character.

Gibbons v. *Odgen*, 9 Wheat. 1.
New York v. *Miln*, 11 Pet. 511.
Maryland Case, 12 Id. 446.
Groves v. *Slaughter*, 15 Id. 511.
Passenger Cases, 7 How. 319.
Cooley v. *Board, etc.*, 12 Id. 319.
Brown v. *Maryland*, 11 Wheat. 438.
Crandall v. *Nevada*, 6 Wall. 35-49.
State Freight Tax, 15 Id. 232–293.
R. R. Co. v. *Fuller*, 17 Id. 560.
Welton v. *Missouri*, 91 U. S. 282.
Henderson v. *Mayor*, 92 Id. 259.
Chy Lung v. *Freeman*, Id. 275.
Sherlock v. *Alling*, 93 Id. 99.
R. R. Co. v. *Husen*, 95 Id. 469.
Gay v. *Baltimore*, 100 Id. 434.

County of Mobile v. *Kimball*, 102 Id. 697.
Telegraph Co. v. *Texas*, 105 Id. 460.
Moran v. *New Orleans*, 112 Id. 69.
Glouscester Ferry Co. v. *Pennsylvania*, 114 Id. 196.
Brown v. *Houston*, Id. 632.

In view of these authorities, surpassingly elaborate, it were a useless expenditure of time and energy to argue at length upon a principle, settled and indisputable. It is observed that the fundamental principles laid down by the case of *Gibbons* v. *Ogden*, *supra*, have undergone frequent supervision but no essential modification. The case of *County of Mobile* v. *Kimball*, *supra*, fixes the boundary line between federal and State commercial power. After dividing regulations affecting commerce into two classes, national and local, the court proceeds to define the latter to be regulations affecting only particular localities, to which class State authority is by the court restricted. Beyond doubt, the States possess this power; for the power vested in Congress is not the power to regulate commerce, but to regulate commerce among the States. But commerce of a national or an inter-state character has, by the Constitution and under the adjudications of this court, been effectually removed from State regulation, and we do not apprehend that the doctrine of a concurrent power remaining in the States will now find a serious champion to encounter reason.

In this case, the sole issue open to argument is whether Section 1553, above quoted, is a regulation of commerce among the States, or merely an act passed by the Iowa Legislature in the exercise of its police

power, having for its object *and scope* the protection of the citizens of the State.

To realize the extent of the power here sought to be exercised by the State, it may be well to recall a few historical facts. Liquor has been a subject of lawful commerce since the days of ancient Egypt, has been recognized by this court to be lawful property, and is to-day so regarded by the Iowa Supreme Court, although in certain events mentioned in Section 1543, it may become a nuisance. Equally true is it that its commercial properties are not dependent upon its locality, but that it has always been, and is to-day, an important branch of inter-state commerce.

Having thus stood upon an equality with other property until the passage of this law, it follows, as a logical deduction, that this power of the States, if exertible upon liquor, extends as well to other all property; and, as an obvious corollary, if Section 1553 is constitutional, it is within the power of the States by the passage of an Act at any time to deprive any and every article of commerce of mercantile properties and value, and prohibit its shipment into the State.

To the mind of the reflecting observer must occur the query: What power is this which the framers of the Constitution have conferred upon Congress? The power to regulate commerce, subject to the right of the States to determine what articles of commerce shall be regulated? A literal reading of the clause would then be: "Congress shall have power to regulate among the States such commerce as the States may permit to be regulated" To hold this Act valid were to reverse the learned and exhaustive opinions above cited; for if a

State can, by a simple concealment of its Act beneath a shadowy disguise or a meaningless pseudonym, still exert the power denied to it by these authorities, it matters little whether its power to do so, after having done so, is classed under the head of police power or any other euphonious title; we are not concerned in the struggle for supremacy between substance and shadow.

II.

Section 1553 contravenes the will of Congress.

Suppose Congress to day to pass a law regulating the sale and transportation of beer among the States, what would be the effect? Here would be two conflicting laws, enacted by two different sovereign powers, for the government of the same community. The Acts of Congress being declared by the Constitution to be the supreme law of the land, every Act inconsistent with them is invalid. Thus, we would find a law, passed by a State and never repealed, to stand void and inoperative. Such an Act could never be law, for it is not even embraced in the definition of law. Law is defined to be a rule of action, prescribed by the supreme power of a State. Is that a rule of action prescribed by the supreme power—a law which can at any time be annulled, through mere implication, by another and an entirely different power?

It is true, our duplex form of government is sometimes productive of an anomaly to which even the logic of definitions must yield; and so this court has held that the laws of a State upon harbors and pilotage, though superseded by subsequent laws of Congress, are, until superseded, valid. But harbors and the like are mat-

ters affecting local commerce, over which the States have jurisdiction, as well as national commerce, over which Congress has jurisdiction, and it is easy to see where the State power in such a case finds origin and where it ends. So with regard to State laws concerning railroads, which are the conductors of local commerce under charters from the States. But these instances, by reason of the circumstances constituting their exceptionality, only demonstrate more clearly the principle upon which this rule is based.

This is now the actual state of affairs. There exists to-day this conflict between the State law and the will of Congress. True, Congress has passed no law declaring in terms that beer may be transported from State to State; but there are two methods to express one's will, by action and by inaction. If the owner of a building permits it to remain, it is a fair inference that he does not desire someone else, who is not the owner, to remove it. In the absence of a restriction, commerce is free, and the inaction of Congress is a declaration of its intention that commerce in commodities unrestricted shall remain free and unimpeded. This construction is supported by the authority of this court in the cases following:

Passenger cases, 7 How. 399.
Welton v. *Missouri*, 91 U. S. 282.
County of Mobile v. *Kimball*, 102 id. 697.
Brown v. *Houston*, 114 id. 632.

In the case of *Welton* v. *Missouri*, *supra*, the court say: "The fact that Congress has not seen fit to prescribe any specific rules to govern inter-state commerce, does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declara-

tion that inter-state commerce shall be free and untrammeled."

In the case of the *County of Mobile* v. *Kimball, supra*, the court, having reference to the question under consideration, employed the language following: "Its inaction in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free."

III.

In enacting said Section, the Legislature of Iowa exceeded its authority.

What is this power known as the police power of the States? This question has upon several occasions been passed upon by this court in the cases above cited; and though, from the nature of the power, it been found impracticable to assign to it a definite field of jurisdiction, its maximum extent has been confined to certain limits. So far as articles of foreign or inter-state commerce are concerned, the police power of the States is held by this court to be the power of self-defense, possessed as well by a State as by its citizens. It is an extensive power. Under this power, the State may exclude property diseased or infectious; may close its gates against improper personages; in short, may exercise that natural right of self-defense without which any existence would be lamentably precarious. This court has decided that, in the necessary exercise of this power, a State may destroy even a cargo of importations infected with disease. The reason for the existence of this power in every community is obvious; but the right of self defense can

exist only in the presence of actual danger; and when it is sought to extend this power to the embracement of all property, there arises the inquiry: Are there no limits to this extraordinary power? This problem has been solved to an extent sufficient for our purpose, for we find the opinion of this court expressed in the following lucid terms:

"It is not necessary (to define more accurately the term police power) because whatever may be the nature and extent of that power, where not otherwise restricted, no definition for it and no urgency for its use can authorize a State to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution."

Henderson v. *Mayor*, 92 U. S. 271.

" It is clear from the nature of our complex form of government that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States."

Id. 272.

" Neither the unlimited power of a State to tax nor any of its large police powers can be exercised to such an extent as to work a practical assumption of the powers conferred upon Congress by the Constitution." "The State may not under the cover of exerting its police power, substantially prohibit or burden either foreign or inter-state commerce."

R. R. Co. v. *Husen*, 95 U. S. 472.

Chy Lung v. *Freeman*, 92 U. S. 275.

We come now to consider the only case perfectly analogous to this ever reviewed by this court. That is th case of R. R. Co. v. Husen, 95 U. S. 469, to the full text of which decision we beg leave to refer this honorable court. That case involved the validity of a Missouri Statute, prohibiting the transportation of Texas cattle during certain periods into the State; and this court held that law to be unconstitutional. Between the principles involved in that case and those applicable to this case, there exists no distinction. That law was declared to be unconstitutional because the legislature had not discriminated between diseased cattle and wholesome cattle. This Iowa law is open to the same objection. It must be borne in mind that, up to the time of the passage of this law, beer was in Iowa upon a commercial equality with other property; with wholesome cattle—and not with diseased cattle. The value of beer was recoverable in the Iowa courts. The Legislature met, and beer, in certain contingencies stated in Section 1543, was suddenly transformed from a salable commodity to a nuisance. To what mysterious agency shall we impute this strange metamorphosis? Could the mere declaration of the Legislature have wrought such a miracle? For the purpose of illustration, we answer, yes. Then, if that is true, wholesome Texas cattle was also a nuisance in Missouri, because the Legislature of Missouri acted with regard to it just as the Legislature of Iowa acted with reference to liquor; that is, prohibited its entrance into the State.

IV.

While a State, under its police power, may deny entrance to a nuisance per se, this power does not extend to property in its ordinary state.

V.

The liquor in question in this case was never, nor is it now, a nuisance under the laws of Iowa, and therefore, any law affecting its transportation among the States is a regulation of commerce among the States.

This Missouri case establishes the principle that all property, in its ordinary condition and used as an object of traffic among the States, is subject to the exclusive control of Congress; but that when, by disease or otherwise, it is transformed so as to lose its character as property and to become a nuisance, no person or community is bound to suffer its presence. The distinction is not vague, nor is the language of the court ambiguous. In the light of this opinion, we propose to analyze this case. If the beer in question in this suit is indeed a nuisance, we claim for it no immunity; but between property infected with disease and liquor not infected, there exists a difference which it requires no captious observer to detect. An article infected with disease is in itself a fruitful source of disease, and disease is no property; it is a nuisance *per se*; its proximity is dangerous; and, upon natural principles, not requiring the Iowa Legislature in their support, any community has power to forbid its entrance. But liquor, so far from

coming within the definition of a nuisance *per se*, is declared by statute to be a nuisance only upon certain happenings, which can transpire only after the liquor has been incorporated into the mass of property of the State. The language of the statute declaring liquor to be a nuisance is the following:

"SEC. 1543. In cases of violation of the provisions of either of the three preceding sections or of sections fifteen hundred and twenty-five of this chapter, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping with intent to sell, use or give away, of any intoxicating liquor is carried on, or continued, or exists, and the furniture, fixtures, vessels, and contents is hereby declared a nuisance and shall be abated as hereinafter provided and whoever shall erect or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding one thousand dollars and costs of prosecution, and stand committed until the fine and costs are paid;"

The three preceding sections and section 1525, to which section 1543 has reference, and the violation of any of which renders liquor a nuisance, are as follows:

"SEC. 1540. If any person not holding such a permit by himself, his clerk, servant or agent shall for himself or any person else, directly or indirectly, or on any pretense, or by any device, sell or in consideration of the purchase of any other property, give to any person any intoxicating liquors he shall, for the first offense be

deemed guilty of a misdemeanor, and on conviction for said first offense shall pay a fine of not less than fifty or more than one hundred dollars and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and every subsequent offense he shall pay on conviction thereof a fine of not less than three hundred dollars nor more than five hundred dollars and costs of prosecution and be imprisoned in the county jail, not to exceed six months. All clerks, servants, and agents of whatever kind engaged, or employed in the manufacture, sale, or keeping for sale in violation of this chapter, of any intoxicating liquor, shall be charged and convicted in the same manner as principals may be, and shall be subject to the penalties herein provided. Indictments and information for violations under this section may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged as on separate indictments or informations, but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and subsequent convictions mentioned in this section shall be construed to mean convictions on separate indictments or information. And in default of the payment of the fines and cost provided for the first conviction under this section, the person so convicted shall not be entitled to the benefit of chapter forty-seven, title twenty-five of this code, until he shall have been imprisoned sixty days."

"Sec. 1541. Any person who shall mix any intoxicating liquor with any beer, wine, or cider by him sold, and shall sell, or keep for sale, as a beverage, such mix-

ture, shall be deemed guilty under the preceding section, and shall be punished accordingly."

"Sec. 1542. No person shall own, or keep or be in any way concerned, engaged, or employed in owning or keeping any intoxicating liquors with intent to sell the same within this state, or to permit the same to be sold therein in violation of the provisions hereof, and any person who shall so own or keep or be concerned, engaged or employed in owning or keeping such liquors with any such intent, shall be deemed, for the first offense, guilty of a misdemeanor; and on conviction for said first offense shall pay a fine of not less than fifty nor more than one hundred dollars and costs of prosecution, and shall stand committed to the county jail until such fine and costs are paid, and in default of such fine and costs, he shall not be entitled to the benefits of chapter forty-seven, title twenty-five of the code, until he shall have been imprisoned sixty days; for the second and every subsequent offense he shall pay a fine of not less than three hundred dollars nor more than five hundred, or be imprisoned in the county jail not more than six months, or by both such fine and imprisonment in the discretion of the court, and upon trial of every indictment or information of violations of the provisions of this section, proof of the finding of the liquor named in the indictment or in the information, in the possession of the accused in any place except his private dwelling house, or its dependencies, or in such dwelling house or dependencies, if the same is a tavern, public eating house, grocery or other place of public resort, or in unusual quantities in the private dwelling house or its dependencies of any person keeping a tavern, public eating house, grocery, or other

place of public resort in some other place, shall be received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale contrary to the provisions hereof."

"Sec. 1525. Every person who shall manufacture any intoxicating liquors as in this chapter prohibited, shall be deemed guilty of a misdemeanor, and upon his first conviction for said offense, shall pay a fine of two hundred dollars and costs of prosecution, or be imprisoned in the county jail not to exceed six months, and on his second and every subsequent conviction for said offense, he shall pay a fine of not less than five hundred dollars nor more than one thousand dollars and costs of prosecution, and be imprisoned in the county jail one year."

Under this section (15-43) furniture, fixtures, vessels and buildings become nuisances simultaneously and upon the same terms with liquors. Can the State of Iowa prohibit the transportation of furniture and fixtures from other States, because these articles may, at some future time, be used for these unlawful purposes, and become a nuisance? Liquor, furniture, fixtures and buildings are embraced by this section. It treats them all with a commendable impartiality; and, whenever one becomes a nuisance under this section, the others are at once endued with the same character. They stand or fall together. Legal proceedings are in all cases requisite to determine whether or not the law has been violated; and, under section 1543, it becomes a matter of evidence as to the act or intent of the owner, whether liquor is still property or has become a nuisance. Until a violation of one of the preceding sections referred to occurs, liquor is still property, and

can only become otherwise by its unlawful use. This construction is rendered by the Iowa Supreme Court in an authoritative case, the court employing the words following: "The object of the Act" (a part of the prohibitory law) "of which the section above referred to is a part, is to suppress the manufacture, use of, and traffic in, intoxicating liquor, except for mechanical, medicinal, sacramental and culinary purposes. The traffic in such liquor, as an article of beverage, is prohibited; but for other purposes it is recognized as an article of commerce, as other property."

Monty v. *Arneson*, 25 Iowa, 385.

"Intoxicating liquor is the subject of property; the commerce in it as an article of beverage is unlawful, but its character as property is not thereby destroyed."

Id. 388.

"In cases of violation of the provisions of the three preceding sections and sections 1525," liquor is declared a nuisance. The three preceding sections, and sections fifteen hundred and twenty-five, to which reference is had, provide that it shall be unlawful to manufacture, sell, and hold or own with intent to sell intoxicating liquors without a permit. Which preceding section to which reference is had by the section quoted, have plaintiffs in error violated? They have attempted to buy liquor, and to have it shipped to them. It is lawful in Iowa to buy liquor without a permit, though it is unlawful for any person to manufacture or sell it, or hold or own it with intent to sell without a permit. But plaintiffs in error are willing to have all possible inferences drawn against them; then arises the question what inference can be drawn? However guilty

their intent, by what possibility could they have violated any of the preceding sections, the violation of which would render this liquor a nuisance? True, it might in time have become a nuisance under the statute, but the question is, did it? The liquor had never been in their hands, they could not have manufactured nor sold it without a permit, nor could they have held or owned it with intent to sell it contrary to law, so long as it was not in their possession. It was a moral and physical impossibility for plaintiffs to have violated any of the sections to which section 1543 contains allusion, until the property would come into their possession, and this could not transpire until after it had left the possession of defendant. At the time, therefore, that it was to come into the possession of the Railway Company, and during the time it was to remain in its possession, no law had been violated; and, under the Iowa Statutes, the liquor in question still retained its character as property. All this is true, not by reason of any peculiarities of this case; but, as a general proposition, admitting of no exception, under the Iowa law, when liquor reaches the hands of common carriers in other States, and while it continues in their possession, no violation such as is contemplated by Sec. 1543 can take place. and it cannot, therefore, be a nuisance. Being property, and no nuisance, it is not subjectible to the police regulations of the State; and retaining its commercial properties, any law relating to it must necessarily be a regulation of commerce, and, until it becomes a part of the property of the State, it is ensured by the Constitution against State interference.

VI.

The intent of the Legislature, in enacting said law, is, like the effect of the law, to regulate commerce among the States.

In construing a law, recourse must at times be had to the intent of its creator as well as to its own effect. What was the intention of the Iowa Legislature in passing the prohibitory law? Did it intend to prohibit the shipment of liquor, on the ground that that product is a nuisance, or was it its intention to enact a commercial regulation, prescribing the terms upon which liquor can be shipped from other States?

It is true, the law provides that, upon the transpirement of certain events constituting a violation, which can be accomplished only by the manufacture, sale, or holding with intent to sell unlawfully, the particular liquor and the instruments employed shall be deemed a nuisance; but, until such an unlawful occurrence, liquor is not divested of its commercial character. It is lawful to hold liquor if held with no intent to sell unlawfully; it is also lawful to buy liquor and to consume it. Moreover, section 1526 contains certain conditions, upon which the fortunate friends of a Board of Supervisors can obtain a permit for the sale and shipment of liquor for any purpose; and, to these persons holding permits, railroad companies are at liberty to ship. The law does not even provide that the liquors so transported under a permit shall be inspected upon admission to the State. Is liquor a less nuisance if shipped to a party holding a permit than if shipped to a person less intimate with the Board? While, for the purpose of argument, it may be conceded that the Legis-

lature of a State has power to prescribe the conditions upon which persons may exercise an avocation within its boundaries, such a right is exercised by the Legislature under its power to regulate its internal commerce; and this law under consideration, prescribing the terms —not upon which a person may sell liquor in the State, but the terms upon which he can ship it into the State from other States, is a regulation of commerce among the States.

Again, liquors imported from foreign countries are expressly excepted and may be brought into this State. Would that be so, if liquor were a nuisance and if it were the intention of the Legislature to prohibit its use and sale? This court has decided that, when the necessity to destroy cargoes exists by reason of their diseased or dangerous character, it matters not that the cargo consists of foreign goods.

Passenger cases, 7 How. 414.

Had the Legislature regarded liquor to be a nuisance, it would have excluded foreign, as well as domestic, liquors. Is foreign liquor a less nuisance than domestic liquor? In what consists the distinction between the commercial standing of liquor, foreign, and domestic? In law, there is none, and any power exercisible upon the one can also be exerted upon the other. The principle established by this court is: "The State can no more prohibit or regulate that (commerce) which is inter-state than it can that which is with foreign nations." "That the transportation of property from one State to another is a branch of inter-state commerce is undeniable."

R. R. Co. v *Husen*, 95 U. S. 469.

A Legislature must be presumed to know the law, whatever violence that presumption might sometimes wreak upon truth. The Legislature of Iowa, while permitting the free ingress of liquor imported from foreign countries, denies to liquor shipped from other States the right of entrance unless consigned to persons having a permit,—a pre-requisite which the board can under the law arbitrarily refuse to grant, as is demonstated by this case. Is this a police regulation or a regulation of commerce?

VII.

The police power of the States can be exerted upon property only in an existing exigency; Section 1553 is not so exercised, but attempts to create a new and an extraordinary power which is entirely unnecessary and superflous.

There is another principle which banishes from the domain of reason the thought that this is a law properly enacted under the police power of the State. It has been decided by this court that the police power of the State cannot be exerted upon a mere caprice nor as a moral experiment, but that the power can arise only from an existing exigency. "Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."

Chy Lung v. *Freeman*, 92 U. S. 280.

What sudden emergency has arisen calling for this extraordinary exercise of power in Iowa? Has anything unexpected occurred? Was liquor suddenly obtruded upon an innocent and unsuspecting public, or did it change its character, or the citizens

their habits? But, conceding, for the purpose of illustration, the existence of a necessity for the abolition of the use and sale of liquor, and the intention of the Legislature to act upon that requirement, in what manner does the adoption of Section 1553 become requisite to the enforcement of the State policy? The State of Iowa has enacted most stringent and arbitrary laws against liquor and its sale, and has provided for a violation wonderful and exemplary punishments. If those laws are not co-extensive with the necessity existing, the State has power to proceed within its territory, even to the extent of capital punishment. It can enact local laws, which, if properly executed, can suppress the use or sale of liquor as effectually as that result can be attained by legal methods. And such laws operate upon the liquor after its incoporation into the property of the State, when it is subject to State jurisdiction. If the State desires to prohibit the use of firecrackers within its territory, what is its proper mode of procedure? Shall it prohibit the Chinese to import the property, or prohibit its use to its own citizens? If it adopts the latter method, and the law is properly enforced, what need of the former law, even if proper and constitutional? A simple test in this case will reveal a like superfluity. Eliminating Section 1553 from the Code of Iowa, we find the policy of the Legislature to remain unchanged, and the laws necessary for its enforcement still to exist. No doubt, by the enforcement of Section 1553, the suppression of the sale of liquor is facilitated; far more effectively so would it be, would the Legislature enact that liquor shall not be brought within a thousand miles of the State boundaries; but whence does the State derive its authority to pass such a law? In the cases cited, this Court holds that this police power

in the States can exist and be exercised only in the presence of an absolute exigency, and refutes the assumption that it can be exerted merely to facilitate the enforcement of another law, for the proper enforcement of which proper means and methods can, under the ordinary powers of the State, be provided. Why extend the power of the State to fields so boundless and extraordinary, when that power it utterly superfluous? Why make use of vast means to compass a useless end? The demonstration of its unnecessity is in itself sufficient ground to render the law—though it were else impervious—unconstitutional and void.

Respectfully submitted.

BLUM & BLUM,

Attorneys for Plaintiffs in Error.

115-611

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

GEORGE A. BOWMAN and FRED. W. BOWMAN,
Plaintiffs in Error,
vs.
CHICAGO AND NORTH-WESTERN RAILWAY COMPANY,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR DEFENDANT IN ERROR.

B. C. COOK,
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STATEMENT.

The defendant is a common carrier, owning and operating a railroad, extending from Chicago, in the State of Illinois, to Marshalltown, in the State of Iowa, and beyond.

After the passage of the act hereinafter set forth, the plaintiffs tendered to the defendant 1000 kegs of beer, and demanded that the defendant, as a common carrier, should receive and transport the same to Marshalltown in the State of Iowa. No certificate, such as is specified in the statute of Iowa hereinafter quoted, was furnished

to the defendant, and no bond or indemnity offered. The defendant refused to receive and transport the beer to Marshalltown, for the reason which was stated at the time of the refusal, that it was prohibited from so doing by section 1553 of chapter 143, Acts of the Twentieth General Assembly of Iowa. (Laws of Iowa, 1884, 150.) The section is as follows:

"SEC. 1553. If any express company, railway company, or any agent, or person in the employ of any express company or railroad company, or if any common carrier or any person in the employ of any common carrier, or if any other person shall knowingly bring within this state for any other person or persons, or corporation, or shall transport between points within the state for any other person or persons, or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, certifying that such consignee, or person for or to whom said liquor is to be transported, is authorized to sell such intoxicating liquors in such county, such company, corporation or persons so offending, and each of them, and any agent of such corporation or company so offending shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars for each offense, and shall stand committed to the county jail until such fine and the costs of prosecution are paid, and one-half of the fine shall go to the informer and the other half shall go to the school fund of the county; *and provided further*, that the offense herein defined shall be held complete, and shall be held to have been committed in any county of the state through or to which said intoxi-

"cating liquors are transported, or in which the same "are loaded for transportation; *provided further*, that "it shall be the duty of the several county auditors of "this state to issue the certificate herein contemplated "to any person having such permit, and the certificate "so issued shall be truly dated where issued, and shall "specify the date at which the authority or permit ex- "pires, as shown by the county records."

The plea alleged that the beer was intoxicating liquor, within the meaning of the statute; that the person to whom the same was consigned, was not authorized to receive and sell such intoxicating liquors under the laws of Iowa, and that the certificate named in the statute was not furnished, and assigned as a reason for refusing to receive and transport such freight, that it was prohibhibited by the statute of Iowa, aforesaid.

A demurrer was filed to this plea. The only point made upon the demurrer was, that the section was in conflict with section 8 article 1 of the constitution of the United States, which is as follows: "The Congress shall "have power to regulate commerce with foreign nations, "and among the several states, and with the Indian "tribes."

The demurrer was overruled by the Circuit court, and from that decision this writ of error is prosecuted.

The only point made against the plea, is the unconstitutionality of the act. If the statute is constitutional, the plea is admitted to be a defense to the action.

BRIEF.

I.

While it is conceded that Congress has the exclusive power to regulate commerce among the states, it is equally true that the several states have the sole power to enact police regulations, and in the exercise of such power may do many things which more or less affect the transportation of persons and freight between the states.

Wiggins Ferry Co. v. *East St. Louis*, 107 U. S., 374.
Gibbons v. *Ogden*, 9 Wheat., 1.

II.

The police powers comprehend all those general powers of internal regulation necessary to secure peace, good order, health, comfort, morals and quiet of all persons, and the protection of all property in the state. Congress cannot legislate on the internal police of a state. The power of a state over its police regulations being supreme.

New Orleans Water Works Co. v. *St. Tammany Water Works Co.*, 14 Fed. Rep., 202.
Ex parte Schroeder, 33 Cal., 279.
Ry. Co. v. *Bowers*, 4 Houst., 506.
Munn v. *Ill.*, 94 U. S., 197.

Ry. Co. v. *Jacksonville*, 67 Ill., 37.
Davids v. *Ry. Co.*, 17 Ga., 323.
Bartmeyer v. *Ia.*, 18 Wall., 113.

The statute of Nevada imposing a tax upon merchandise brought into the state held constitutional.

In re Rudolph, 2 Fed. Rep., 66.

Tax imposed on sales of merchandise in Alabama held constitutional.

The court says:

"The case before us is a simple tax on sales of mer-
"chandise, imposed alike upon all sales made in Mobile,
"whether the sales be made by citizens of Alabama or
"other states, and whether the goods sold are the product
"of that state or some other. There is no attempt to dis-
"criminate injuriously against the products of other states,
"or the rights of their citizens, and the case is not there-
"fore an attempt to fetter commerce among the states, or
"to deprive the citizens of other states of any privileges
"or immunity possessed by citizens of Alabama."

Woodruff v. *Parham*, 8 Wall., 140.
Hinson v. *Lott*, 8 Wall., 152.

The law of New York requiring a report as to passengers brought into the state is a police regulation.

City of New York v. *Miln*, 11 Peters, 102.

Statutes like the statute of Iowa now under consideration are police regulations established by the legislature for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances, and are constitutional.

Cooley's Constitutional Limitations, 581.

Commonwealth v. *Kendall*, 12 Cush., 414.
Commonwealth v. *Clapp*, 5 Gray, 97.
Commonwealth v. *Howe*, 13 Gray, 26.
Santo v. *State*, 2 Ia., 202.
One House v. *State*, 4 Green (Ia.), 172.
Zumhoff v. *State*, 4 Green (Ia.), 526.
State v. *Donehay*, 8th Ia., 396.
State v. *Wheeler*, 25 Conn., 290.
Reynolds v. *Gary*, 26 Conn., 179.
Ovitt v. *Pond*, 29 Conn., 479.
People v. *Howley*, 4 Mich., 244.
Gill v. *Parker*, 31 Vt., 610.
Meshmier v. *State*, 11 Ind., 482.
Vanderbilt v. *Adams*, 7 Cowan, 351.

It has been expressly decided by this court that as a measure of police regulation looking to the preservation of public morals a state law prohibiting the manufacture and sale of intoxicating liquor is not repugnant to any clause of the constitution of the United States.

Bartemeyer v. *Iowa*, 18 Wall., 129.
Beer Co. v. *Mass.*, 97 U. S., 33.
Foster v. *Kansas*, 112 U. S., 205.

This law has been decided to be constitutional, in its main provisions at least, by the Supreme court of Iowa.

Littleton v. *Fritze*, 22 N. W. Rep., 641.

It is a well settled rule, that courts will not declare legislative enactments void by reason of their repugnance to constitutions, state or federal, except when the judicial mind is clearly convinced of such repugnancy.

The legislature cannot part with any of the police powers of the state which are matters that affect the public peace, public health, public morals and public convenience.

Farmers' Loan and Trust Co. v. *Stone et al*, 20 Fed. Rep., 270.

Allerton v. *City of Chicago*, 6 Fed. Rep., 555.

In re Wong Yung Quy, 2 Fed. Rep., 624.

It is well settled now that the states have the power to prohibit the sale of intoxicating liquors within the borders of the state. This prohibition must necessarily be a restriction upon the importation of such liquors from other states, and if the prohibition was made for the purpose only of preventing such importation, it would be void, but when made for the protection of morals, public health and good order, it is clearly within the power of the state.

The right to prohibit the bringing of certain articles into the state because such importation endangers the public safety, is not affected by the fact that the articles so prohibited may be articles of property and of value as property. When the public safety demands it the state has the right to prohibit the bringing of articles of property within the limits of the state, or to impose conditions or restrictions upon such importation for the protection of the public health, morality and good order. This right has always been exercised by the states without question. Certain articles of property deemed prejudicial to the morals of the people have been excluded by the laws of the states.

Revised Statutes of Illinois, Chap. 38, Sec. 379, ex-

cludes certain books, pamphlets, engravings, models, casts, lithographs, photographs, etc.

See Sec. 9,289 Howard's Annotated Statutes, of Mich.
Section 4,032, Statutes of Iowa.
Section 4,590, Statutes of Wisconsin.
Sec. 12, Chap. 100, Revised Statutes of Minnesota.

In nearly every state restrictions are laid upon the importation of certain articles for the protection of the public health. Dynamite can be brought into Michigan and many othes states only when packed and marked in a certain manner involving large expense.

ARGUMENT.

The people of the State of Iowa, at the general election in 1882 adopted the following amendment to their constitution. Section 26, Laws of Iowa, 1882, page 178:

"No person shall manufacture for sale, or sell, or keep "for sale as a beverage any intoxicating liquors what- "ever, including ale, wine, and beer. The general as- "sembly shall by law prescribe regulations for the enforce- "ment of the prohibition herein contained, and shall "thereby provide suitable penalties for the violation of "the provisions hereof."

In pursuance of this express mandate of the constitution the legislature of the State of Iowap asse̊d the prohibitory law, one of the sections of which is now under discussion. I submit that an examination of this law will show that the object and intent of it was simply and solely to prevent the sale and use of intoxicating liquors within the State of Iowa. Experience had shown that it was impossible to prevent the use and sale of this beverage while such intoxicating liquors might be freely manufactured and transported from point to point within the state or imported into the state without restriction, so the legislature undertook to prohibit the manufacture inside of the state, and impose certain conditions upon the transporting of intoxicating liquors within the state, and upon importing them into the state. It needs no discussion to show that the terms of this law apply equally to liquors manu-

factured within the State of Iowa, or transported from point to point within the state, and liquors manufactured out of the state and transported into it.

It is clearly manifest that the object of the law was to enforce and carry into effect the amendment to the constitution which had been ordained by the people of the state. There is no pretence that the intent or effect of the law is to give the people of the State of Iowa any advantage over the people of any other state in the manufacture and transportation of intoxicating liquors. An inspection of the debates of the convention which framed the constitution of the United States will satisfy any one that the objects of the provisions of section 8, article 1, was to prevent the inhabitants of any state from imposing unequal burdens upon citizens of other states, and this was the sole object of that section. In this case that section of the constitution is not now relied upon for the purpose of removing any unequal burden imposed by the law of the State of Iowa upon any citizens of another state, or any restriction upon the commerce of other states which does not apply equally to the commerce of Iowa, but its aid is invoked for the sole purpose of nullifying the power of the State of Iowa to suppress the use and manufacture of intoxicating liquors within the limits of the state, and to prevent an injury resulting therefrom to the health, morals and good order of the people of that state.

If Congress has the exclusive power to regulate commerce among the several states, it is equally true that each state has the exclusive power to enact its own police regulations, and with those police regulations Congress has no concern. If it be within the power of the people of the State of Iowa to pass the amendment to the state constitution above quoted, it is equally within their power

to adopt all necessary means to enforce it, and it is not within the power of Congress to nullify it by any legislation.

It is conceded by counsel for plaintiff substantially that the state has the right to pass a prohibitory law, and it has been so decided so often in this court that it may be considered as settled, but it is contended by counsel: 1st. That it is not necessary to carry into effect the statute of Iowa, that this provision contained in section 1553, should be enforced, and 2nd. That if it were necessary then the whole law is a violation of the constitution of the United States. I shall not discuss the question whether the state has the right to pass the prohibitory law, assuming that that is settled.

I shall only discuss the other question stated, whether section 1553 is a proper provision to carry into effect the object of the statute.

First. I suggest that the question as to what means are necessary to enforce this law of the State of Iowa is to be decided by the law-making power of that state, and not by this court, unless it shall be clearly manifest that the provisions of the law violate the provisions of the constitution of the United States.

By the terms of the section now under discussion, the legislature of Iowa does not prohibit the transportation of intoxicating liquors into that state, but it imposes certain conditions and restrictions upon such importation.

It requires that the person to whom such intoxicating liquor is consigned, shall be a person who is authorized to receive and hold the same and sell the same for lawful purposes under that statute, or in other words that intoxi-

cating liquors shall not be brought into the state for the purpose of violating the law of the state.

What right of any person residing in the State of Iowa, what honest purpose of any person is to be secured by declaring the law unconstitutional?

The object of the law is to protect the health, morals and good order of the people of the State of Iowa, and the means it adopts to secure this end affect equally the citizens of the State of Iowa and the citizens of other states. Neither the reason nor the object of the section of the constitution of the United States, now under discussion, require that this section should be held void.

Then it is clear that the power of the national government has been invoked to prevent the people of the State of Iowa from effectually prohibiting the manufacture, sale and use, as a beverage, of intoxicating liquors within that state, for that that is the object of this suit, I submit to the court, admits of no question.

The only reason which seems to be insisted upon against the power of the State of Iowa to enact this section, is that intoxicating liquor is property, and therefore it may be taken anywhere within the United States. I submit that if the law of Iowa, so far as it seeks to prohibit the sale and use as a beverage of intoxicating liquors within the State of Iowa, is a valid law, then by the terms of that law intoxicating liquor within the State of Iowa is not property in that broad sense of the term. It is no more property than any other article which may be declared a nuisance by a valid law. But if it is property, I think this court will hesitate before laying down the proposition that the state in the exercise of its powers may not prohibit the importation into the state of any article

which it deems prejudicial to the health, morality and good order of its citizens. If this principle was to be adopted, statutes in other states which have been passed and which are admitted to be purely police regulations, would be rendered invalid.

Much stress has been placed in the argument of counsel for plaintiff upon the case of *Railroad Company* v. *Husen*, 95 U. S., 469. The point decided in that case was simply this, "that the state could not prohibit the transportation "of cattle into and through its territory beyond what was "necessary for self-protection. It was decided that the "importation of diseased cattle might be prohibited, al- "though they were property and of value; the reason "why their importation might have been prohibited was "because such importation would bring infectious diseases "into the State of Iowa. The reason why the legislature "of the State of Iowa might not prohibit the carrying "through the state of cattle not infected with contagious "disease is upon the ground that such prohibition was "not necessary for the protection of the people of Iowa, "and would practically give advantage to the people of "Iowa over the people of other states."

To make the decision in that case in point in this case the decision should have held that the importation of cattle being diseased with an infectious disease should not have been prohibited by the State of Iowa, because they were property, unless this court is willing to go further and decide that the law-making power of the State of Iowa is mistaken in supposing that intoxicating liquor is injurious to the health, morality and good order of the people of the state, and to decide as matter of fact that such importation is not injurious to the welfare of the

people of Iowa, and consequently not property subject to police regulation.

Two propositions of fact certainly appear from this record:

First. That the object of the statute was one clearly within the power of the state.

Second. That this object could not be attained if citizens of other states have the right, by virtue of the constitution of the United States, freely to import intoxicating liquors into the state against the will of the people of the state.

To say that a state shall never pass upon a question as to what is a proper police regulation, is simply to say that it shall never enact any police regulation whatever. I submit, that after a state has thus passed upon a question, and the effect of its determination could result in no possible discrimination between the citizens of its own state and the citizens of other states; and no attempt has been made to discriminate against the products of other states, or the rights of their citizens, no case is made for the interference of the national authority.

III.

If I am mistaken in my view of the main question in the case, then this question arises, was this defendant bound to decide for itself in advance of any adjudication of the question by any court having jurisdiction thereof, and take the risk of incurring the heavy penalties prescribed by the act.

The court will see that they are very heavy.

The plea shows affirmatively that the defendant, in refusing to receive the beer for transportation, assigned for the refusal that such transportation was forbidden by the law of Iowa. No offer of indemnity was made by plaintiff, and the contention of the plaintiff amounts to this: That the defendant was bound to receive and transport the freight, assuming the risk of the penalties named in the act. I do not think that there is any such duty imposed by law upon common carriers. It is laid down by all text writers and adjudicated cases that there may be reasonable grounds for refusal by carriers to receive goods for transportation. The principal leading case upon this subject is that of *Edwards* v. *Sherratt*, 18 East, 604. It is, I think, manifest that it would be oppressive upon this defendant to hold that it is bound to subject itself to the risk either of paying damages to all persons tendering property for transportation forbidden by the law of Iowa, or to the risk of paying the penalties provided for by this act. This defendant, as soon as the enactment of the law, obeyed its provisions strictly, believing that it was bound to do so, and I have endeavored to state the reasons why it has refused this character of freight, nevertheless it is true that this company has obeyed the law at a financial loss to itself, having been compelled to refuse to receive money which it might have earned by the transportation of this peculiar kind of freight and this case is submitted to the court in the hope that the law may be settled in such manner that this defendant acting fairly and honestly may escape the risk of being amerced in damages by the decision of the Federal courts, or on the other hand being subjected to the heavy penalties under the decisions of the state courts of Iowa.

It is right for me to state, I think, in conclusion, that I

have advised the attorney general of the State of Iowa of the pendency of this suit, and have invited him to file an argument in support of the law in this case, and I have also advised the governor of the State of Iowa of the pendency of this suit, and of the questions involved in it, as I understand them, and have invited him to have the State of Iowa represented by counsel in the case.

B. C. Cook,
Attorney for Defendant.

Office Supreme Court U. S.
FILED.
OCT 26 1885
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

GEORGE A. BOWMAN AND
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I HAVE to thank the counsel for the defendant in error for the very courteous request to join with him in presenting this cause to this Honorable Court of last resort. Involving, as it does, the validity of a statute which has for thirty years been the settled policy of the State, and which I have the honor to represent as its chief legal advisor and officer, I have no hesitancy in complying with the request of this learned counsel.

In doing this I will not take up the time of the court in making any statement of the cause, but simply refer to the statement of B. C. Cook, Esq., as contained in his brief and argument.

Neither will I make any special brief of authorities and points outside of my argument, inasmuch as the main points relied upon, and the authorities in support thereof, are contained in said brief of B. C. Cook. What additional authorities I may cite will be inserted in the argument when and as the same are referred to.

Since the year 1855 there has been in force in the State of Iowa laws prohibiting the manufacture and sale of intoxicating liquors as a beverage.

The law as first enacted was very sweeping in its provisions, including all kinds of intoxicating liquors.

By an act of the legislature of Iowa, passed January 28, 1857, (chapter 157, laws of Sixth General Assembly, page 231,) provision was made for the sale of intoxicating liquors for "*mechanical, medicinal, culinary,* and *sacrimental purposes only,*" under certain regulations, requiring the person so selling to obtain a *permit* in the manner and under the restrictions pointed out in the law.

Section 7 of this act of January 28, 1857, was as follows:

"If any railroad conductor, freight agent, expressman, depot master, or other person in the employment or in any way connected with any railroad company, or any teamster, stage driver, or common carrier of any kind, or any person professing to act as agent for any other person or persons, whether within or without this State, or any other individual of whatever calling, shall bring within

this State for any other person or persons, any intoxicating liquors without first having been furnished with a copy of the certificate authorizing such person or persons to sell such intoxicating liquors certified, etc., such person so offending shall be deemed guilty of a misdemeanor, and" etc.

This remained in force as the law of the State of Iowa upon that subject until amended by act of the General Assembly of Iowa, approved April 3, 1884, when the law now before the court for its consideration was enacted in its present form. The points of difference between the law as it formerly existed and the present law, is:

First. The act of January, 1857, did not operate directly on the railroad and express companies, etc., but was directed against the conductors, stage drivers and agents of such companies, whereas the present law operates against the principal as well as against the agent and employe.

Second. The act of January, 1857, only prohibited the bringing of such liqours into the State, whereas the present law in addition thereto prohibits its transportation between points within the State.

Third. The two acts differ in the penalties and in the minor details.

So far as this cause and the questions involved are concerned, however, there is no material difference in the two laws. The greatest difference being that in the old law there was a discrimination that is not in the present law, in this, that while the old law prohibited the transportation of liquors from point without the State to points within the State, it did not, as does the law now before the court, prohibit such transportation between points wholly within the State of Iowa.

The court will see by an examination of the laws of Iowa for the suppression of intemperance that the statute does not in any particular interfere with the regulations of commerce as established by Congress, or commercial treaties.

Section 1524 of the Code provides as follows: "Nothing

in this chapter shall be construed to forbid the sale, by the importer thereof, of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws."

The question involved in this case is whether the provisions of the Iowa statute, limiting the sale of intoxicating liquors as it does is an authorized exercise of the police powers of the State, or whether it is an attempt upon the part of the State "to regulate commerce among the several States?"

The right of the State to prohibit the sale of intoxicating liquors is not now an open question as stated by Mr Justice Miller in *Bortemyer vs. Iowa*, 18 Wal., p. 132. "It has never been seriously contended that such laws raised any question growing out of the Constitution of the United States * * * no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such right exists, is not one of the rights growing out of citizenship of the United States."

This point being established, viz: that the States have the right—in so far as any restrictions upon part of the Constitution of the United States is concerned—to prohibit the sale and traffic in intoxicating liquors within their borders, we think it follows as a corrollary of the conceded point, that the State must have the power to make its laws on this subject effectual to prevent the evils designed to be prevented. That the State has the right to enact and enforce such legislation as will prevent evasion of its laws.

If such necessary safeguards affect in some degree the commerce in the prohibited liquor as between the States enacting the law and sister States, it does not thereby follow that it is a regulation of commerce among the several

States as contemplated by Sec. 8, Art. 1, of the Constitution of the United States.

We claim, therefore, that the law in question is simply an exercise of the police power of the State. That the object of this law is the promotion of the health, happiness, morality and material prosperity of the citizens of the State. That not only has this court so recognized these laws for the suppression of intemperance, but it has, by numerous expressions of the great and learned men who now do and have heretofore composed the court, commended this class of legislation as wise and prudent.

That the States possess this power there can be no question.

While we admit the proposition that to Congress exclusively belongs the power to regulate commerce among the States, we nevertheless claim that it is just as clearly settled that to the States belong the exclusive right to regulate its domestic police.

While it is true that general regulations respecting commerce, when enacted by Congress, may incidentally affect the police of the State, and yet not be violation of the reserved rights of the State, it is also true that laws respecting the internal police of the State may, in their operation, interfere with commerce to a certain extent, and nevertheless be a valid exercise of State legislation.

See *Gibbons v. Ogden*, 9 Wheat., at p. 204.

It is not the remote effect of a law that determines its character; it is the apparent aim and object of it.

"It cannot be correctly maintained that laws which may remotely or incidentally affect commerce are on that account to be deemed void. To render them so they must be *essentially and directly* in conflict with some power clearly invested in Congress by the Constitution; and, I may say, with some regulation actually established by Congress."

Mr. Justice Doud in License Cases, at p. 615.

Speaking upon this same subject Mr. Justice McLean

says (5 How., p. 590): "These are not regulations of commerce, but acts of self-preservation. And although they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the State."

It may be well, right here, to consider the question:

What are police laws?

Probably no general definition can be framed that will express fully the idea.

It may be said, in a general way, that it is the inherent right of communities to protect themselves. It is to communities what the law of self-defense is to the individual. It is the first law of nature and is superior to written laws or constitutions.

It is varying as circumstances vary. That may become essentially a required exercise of police power at one time, which did not exist in a former time. This view of it is most tersely and aptly stated by Mr. Justice McLean in License Cases, 5 How., at p. 591–2:

"In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgencies spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease, *must mainly depend on the evil to be remedied.*

Under the pretense of a police regulation, a State cannot counteract the commercial powers of Congress. And yet, as has been shown, to guard the *health*, *morals* and *safety* of the community, the laws of a State may prohibit an importer from landing his goods, and may sometimes authorize their destruction."

This language completely covers the thoughts I had in my mind when attempting in my crude way to define police powers. I do not desire to read this learned court a lecture on temperance. I am not a temperance lecturer,

but we cannot shut our eyes to the potent fact that of all agencies known to society there are none which in so great a degree and so directly contribute to debauch society as the intemperate vice of intoxicating liquors. None are so prolific in the impairment of *health*, the destruction of *morals*, or the *safety* of life as this one agency.

Every morning paper has its chapter, showing as a result of this accursed traffic, the disruption of marital and family ties, the fatal quarrels among former friends, the destruction of life and property, the outraging innocence, while the great bulk of crime and pauperism is traceable to this source. The stay of this curse has been the study of legislators and philanthropists for ages, and it would be no fancy flight of imagination to say that he who could obliterate the traffic from the face of the earth would be canonized as man's greatest benefactor.

But let us still further pursue this question of what is the police power of the State. Chief Justice Marshall says in *Gibbons vs. Ogden*, 9 Wheat., at p. 203, that it includes "inspection laws, quarantine laws, health laws of *every description*."

Again the same learned jurist says, in *Brown vs. Maryland*, 12 Wheat., at p. 443: "The power to direct the *removal* of gunpowder is a branch of the police power which unquestionably remains and should remain with the State, and the *removal* of infectious or unsound articles is doubtless a branch of the same power."

If the power of *removal* is a part of the police power, why would it not be just as competent to stop the bringing in of the offensive substance as to direct its *removal* after it is brought in?

But let us see further if this control over the traffic in intoxicating liquors in the State is not an exercise of police power.

In 1847 the license cases came before this court. It was among the first State efforts at controlling the traffic. It was contended by the plaintiffs in error in these cases that the laws which they were attacking amounted to

prohibition in the traffic of intoxicating liquors. This was the position taken by Mr. Webster, that as applied to imported liquors it was a regulation of foreign commerce.

This view did not receive the sanction of the court. It was held to be a proper exercise of the police power of the State.

I have already quoted from Mr. Justice McLean on this. I further quote from the same Justice, at page 592. He says: "If a foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications."

And further, in these same cases, I will quote from Mr. Justice Woodbury, pp. 627, 628, where he says:

"From the first settlement of this country, and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquors. * * * The tendency of such laws clearly is to reduce family expenditures, secure *health, lessen pauperism and crime*, and co-operate with, rather than counteract, the apparent policy of the general government itself in respect to the disuse of ardent spirits.

"*They aim, then, at a right object. They are calculated to promote it. They are adapted to no other.* And no other, or sinister or improper view, can therefore, either with delicacy or truth, be imputed to them."

This is just what we claim is the direct and only object of the Iowa laws for the suppression of intemperance. They are not, strictly speaking, prohibitory. That is, they only prohibit the traffic and sale in the channels wherein experience has shown the evils to exist, viz.: as a beverage.

The language of that part of the law which is prohibitory, is as follows:

"Wherever the words intoxicating liquors occur in this

chapter, the same shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatsoever: and no person shall manufacture for sale, sell, or keep for sale, as *a beverage*, any intoxicating liquors whatever, including ale, wine and beer." (Sec. 1555 of the Code, as amended by 20th G. A. See page 8, acts 20th G. A. of Iowa.)

Section 1524 of the Code exempts the law from the operation of the laws of Congress respecting importations.

Sections 1526 to 1538, inclusive, provide for the sale of liquors for mechanical, culinary, medicinal and sacramental purposes, and makes provision for the shipment of liquors to such persons as hold the permit to sell for lawful purposes. And these further provide penalties for shipping to persons other than those so authorized to sell. This is done, not with a view to regulate or embarass commerce, but solely for the purpose of preventing evasive violations of the law.

Viewed in this light, then (that is, in the light of the object of the law), it must be conceded to be an exercise of rightful police power.

The incidental effect viz.: that in some degree it interferes with commerce, is not the controlling feature in construing the law. It must be construed in reference to its ultimate aim and object; and construing it thus we may very properly, quote from the language of Chief Justice Marshall, in *Gibbons vs. Ogden*, at p. 204: "So if a State, in passing laws on subjects acknowledged to be within its control, and with a view to applying it to these subjects, shall adopt a measure of the same character which *Congress may adopt*, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means."

Again, in *Patterson vs. Kentucky*, 97 U. S., at page 506, Mr. Justice Harlan uses the following strong language in reference to these powers of the States:

"This court has never hesitated by the most rigid rules

of construction, to guard the commercial power of Con gress against encroachments in the form or under the guise of State regulations, established for the purpose and with effect of destroying or impairing rights secured by the Constitution. It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of society, of upholding State police regulations which were enacted in good faith and had appropriate and direct connection with that protection to life, health and property which each State owes its citizens."

This question of the object of the State law is always a proper question of inquiry. If the apparent object is to hinder or obstruct commerce then the courts do not hesitate to declare the law void. If however the object is the promotion of the good order, peace, morality, health and prosperity of the State, and the good faith of this intention is apparent, then the court will uphold the law as a proper and legitimate exercise of the police power of the State, even though in its operations it may interfere with subjects over which the powers of Congress are supreme and exclusive.

In a greater or less degree all this mass of police laws affect commerce. Inspection and quarantine laws stop the cargo and passengers at the border of the State and detain them, and under certain conditions refuse to admit them; may even throw the cargo into the sea if necessary to protect life or health. If food, and it is adulterated or impure, it may be refused admittance. In like manner obscene literature or prints may be refused admittance. Many similar laws that in their enforcement interfere with commerce might be instanced, but it is not necessary. This court is familiar with them and will readily see the particular point I desire to make.

The simple question is, it being admitted that the State may pass laws in restrainst of intemperance, and to prohibit the use of ardent spirits as a beverage—can it go so

far as to prohibit its shipment into the State—from sister States—to be there kept and sold in violation of its laws?

As will be seen by reference to section 1524 of Code, already quoted, this law does not attempt to interfere with the subject of importations, upon which Congress has legislated.

It seems to me that it would be a solecism to say to a State: "You may prohibit the sale of liquors as a beverage, but you cannot prevent your common carriers from bringing such liquors into the State for the purpose of being sold in violation of your laws." Common experience would teach any one that a law so hampered would be a dead letter upon the statute books. This view of the case is well put by Mr Justice McLean in License Cases, at p. 595, where he says:

"If the mere conveyance of property from one State to another shall exempt it from general State regulation, it will not be difficult to avoid the police laws of any State, especially by those who live near the border."

It is claimed by plaintiff in error that intoxicating liquor is property and recognized as such by the laws of the United States.

The only specific recognition that is given to intoxicating liquors as property by Congress is in the laws regulating its importation. As has already been shown the law now under consideration does not interfere with such laws. Aside from this recognition there is no more property recognition in regard to liquors than there is in regard to gunpowder, or dynamite, or a glandered horse, or a cow having anthrax; or than there is in adulterated food, or any other chattel that experience has shown to be deleterious to health. There is no more property in intoxicating liquors than there is in lottery tickets, indecent prints, obscene books, cards and dice, and gaming apparatus, and before the war, in slaves. And yet there has never been a question as to the right of a State in the absence of congressional legislation on the subject, to ex-

clude any or all of these from the State; to prevent their introduction, to stop them at the border.

In the language of Mr. Justice Woodbury, in License Cases, page 628:

"It is conceded that States may exclude pestilence, either to the body or mind" —and he might have said, and soul—"shut out the plague or cholera, and, no less, obscene paintings, lottery tickets and convicts."

Holmes v. Jennison, 14 Pet., 568.

Gibbons v. Ogden, *supra*.

Mayor of N. Y. v. Miln, 11 Pet., 102.

I cannot better close the consideration of this subject than by using the language of that eminently pure and able jurist, Mr. Justice Grier, found in 5 How., pp. 631, 632.

"It has been frequently decided by this court that the powers which relate to merely municipal regulations, or internal police, are not surrendered by the States, or restrained by the Constitution of the United States; in relation to these the authority of the State is complete, unqualified and conclusive.

"Laws for the punishment of crime, for the preservation of public peace, health and morals, must come within this category. As subjects of legislation, they are, from their very nature, of primary importance; *they lie at the foundation of social existence;* they are for the *protection* of *life and liberty*, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience or luxury, to recede, when they come in conflict or collision, '*salus populi suprema sex*.'

"It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of passengers, they operate on the ship, which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo and cast it overboard. * * * All these things are done,

not from any power which the State assumes to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime, and protection of public welfare, must, of necessity, have full and free operation, according to the exigency which requires their interference.

"It is not necessary, for the sake of justifying the State legislation now under consideration, to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power which is exclusively in the States, is alone competent to the correction of these great evils, *and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.* There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousand fold in the health, wealth and happiness of the people."

When it is considered that this opinion was rendered in a case involving this same traffic, which was then only sought to be restrained by license—but then, as ever, impatient and intolerant of any restraint: then, as now, cobra-like, determined to have no interposition between it and its victim—it seems almost as if the venerable Justice had risen from his tomb to make his voice heard in defense of this later legislation in behalf of humanity, of the home and its purity, of the peace and welfare of society.

I cannot for a moment bring my mind to the conclusion that this court will do otherwise than uphold this law. It is not sought to be broken down in the interest of advanced humanity, in the interest of health, material prosperity or morality. It is a suit brought by those opposed to all laws of restraint of the drink traffic, for the express purpose of breaking down this formidable barrier to their illicit trade. It is the saloon interest of Iowa making the Macedonian cry to its co-disciples in Illinois

to come to their aid, and break down the law which restrains them. No public good is sought to be subserved by so doing. Evil, and only evil, can be the result of a compliance with their demand.

I am aware that this court is not sitting here for the purpose of deciding cases on the question of public or private convenience. That its only inquiry is into the "thus sayeth the law." But sometimes when the scale is almost in equipoise, the good or the evil will influence the balance.

I do not so regard this case, however. There is no doubt of the State's power to make prohibition sweeping and complete. This being so there can be no reason why it may not say to its comers within the State: "You shall not, under penalties, aid in evading this law."

One more point of consideration and we have done. I have heretofore adverted to the feature of the law which exempts its operation from interfering with the laws of Congress respecting the importation of liquors.

I now raise the point that this is one of the class of cases in which the State in absence of congressional legislation may protect itself against the evils of this traffic, even to an interference with commerce.

This distinction is clearly made and forcibly stated in the license cases by the learned Chief Justice, especially in drawing the distinction between the New Hampshire case and the Massachusetts and Rhode Island cases. At page 578 he makes the distinction in this language:

"The present case, however, differs from *Brown vs. Maryland* in this, that the former was one arising out of commerce with foreign nations, which Congress had regulated by law; whereas the present is a case of commerce between two States, in relation to which Congress has not exercised its power."

The learned Chief Justice then argues the proposition in what seems to me to be unanswerable logic.

In respect to this Mr. Justice McLean says (5 How. at 595): "there is no act of Congress to which the license law

as applied to this case can be held repugnant, and the general power in Congress to regulate commerce among the several States under the restrictions in the Constitution, cannot affect the validity of the law."

In the same case Mr. Justice Catron holds to the same views, and argues upon it at length, and at page 605 says: "But as no general law of Congress has regulated commerce among the States, such a rule cannot apply here."

With this Mr. Justice Daniel also agrees, and says at page 615: "It cannot be correctly maintained that State laws which may remotely or incidentally affect foreign commerce are on that account to be deemed void. To render them so, they must be essentially and directly in conflict with some power clearly invested in Congress by the Constitution; and I would add, *with some regulation actually established by Congress in virtue of that power.*"

Mr. Justice Nelson concurred in the opinion delivered by the Chief Justice, and Mr. Justice Catron; and Mr. Justice Woodbury very decidedly holds to the same opinion, (see page 624). Mr. Justice Grier did "not consider the question of the exclusiveness of Congress to regulate commerce as necessarily connected with the decision," and so announced no opinion upon that point. He was fully satisfied that it was an exercise of an undoubtedly valid police power, and if as such it incidentally affected commerce it was not for that reason void.

See also on this subject:

Munn vs Illinois, 94 U. S.

C., B. & Q. R. R. vs. Iowa, 94 U. S., 155.

Peck vs. C. & N. W. R. R., id. 164.

In the last case cited the court say: "Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, so far as they are of domestic concern. * * Until Congress undertakes to legislate for those who are without the State, Wisconsin may provide

for those within *even though it may indirectly affect those without.*"

Similar language is used in the other cases cited.

In *Wilson vs. Blackbird Creek Marsh*, 2 Pet., 251, Chief Justice Marshal says the law of Delaware could not "be considered as repugnant to the power to regulate commerce *in its dormant state.*"

Again in *Gillman vs. Philadelphia*, 3 Wal., 730, the same doctrine is enunciated, and in delivering the opinion Mr. Justice Swayne says: "The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules, and National legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. *To this extent the power to regulate commerce may be exercised by the States.*" Police laws passed to protect the health, morals and safety of communities are undoubtedly of this latter class.

United States v. Dewit, 9 Wal., 41.

Again in *Osborne v. Mobile*, 16 Wal., at p. 482, Chief Justice Chase uses the following language: "It is to be observed that Congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the court has asserted *the rights of the States to legislate*, in the absence of legislation by Congress, upon subjects over which the Constitution has clothed that body with legislative authority."

I have extended this argument to a greater length than I had intended, and perhaps to a greater length than is necessary in view of the able argument made by the counsel for defendant in error.

It is a question, however, in which the State of Iowa is deeply interested. For the purpose of protecting her citizens, and in the hope that the curse of intemperance may be stayed or diminished witnin her borders, the State has

enacted the law, now called in question. This was enacted for the sole and only purpose of preserving the health, morals, and prosperity of her citizens, and not with any hostile motive, or intent to interfere with the sovereign prerogatives of the general government.

Upon the subject her citizens are profoundly moved, and will look with anxious expectation to this court, hoping and trusting that its laws may be upheld and sustained, and kept inviolate from the threatened evasions which are contemplated by the plaintiffs in error in this suit.

Respectfully submitted,

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